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Chairman: Mr. Lelong ..... (Haiti)

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Agenda item 162: Report of the International Law Commission on the work of its fifty-third session (*continued*)

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The meeting was called to order at 3.15 p.m.

Agenda item 162: Report of the International Law Commission on the work of its fifty-third session (*continued*) (A/56/10 and Corr.1)

1. **Mr. Prandler** (Hungary), referring to the topic "Reservations to treaties", said his delegation noted with satisfaction that the Special Rapporteur and the International Law Commission continued to uphold the goal of producing a Guide to Practice relating to reservations and interpretative declarations, which would systematize the prevailing practice of States and international organizations. It agreed that reservations were useful in that they might be conducive to States becoming parties to multilateral treaties and thereby contribute to the general acceptance of international legal norms.

2. His delegation welcomed the adoption of the 12 draft guidelines, and agreed that they should cover international organizations, as well as States; that approach reflected the increasing role played by international organizations in law-making, a trend which should be encouraged.

3. His delegation could accept the content of most of the draft guidelines and the commentary thereto. It supported a regime through which the integrity of treaties and the principle of *pacta sunt servanda* would be upheld. It agreed that conditional interpretative declarations should be covered by the guidelines; however, they should be subject to the same legal regime as reservations. It was possible that only a single general guideline would be needed, as suggested in paragraph 123 of the report.

4. On the issue of late formulation of reservations, the guidelines reflected the developing practice of States and international organizations, including the practice followed by the Secretary-General of the United Nations. Since the issue had not been covered by the Vienna Convention on the Law of Treaties, the restricted approach taken by the Special Rapporteur was acceptable. His delegation believed that the late formulation of reservations should be permitted only as an exception to the rule and only if the States parties accepted them.

5. Hungary was the depositary of only a few multilateral treaties. His delegation shared the view that the depositary should faithfully implement its role, which was primarily administrative in nature, without making any attempt to influence or prejudge the views of the States parties concerning issues which might be raised by them.

6. His delegation supported the view that the international community could not tolerate reservations to human rights treaties if they ran counter to the major objectives and principles of the treaties in question. It would have liked more information on activities in the field of human rights treaties by the Commission on Human Rights and the Subcommission on the Promotion and Protection of Human Rights, and the interrelationship of such activities with the work of the Commission, and hoped that those issues would be covered in the next report.

7. **Ms. Dascalopoulou-Livada** (Greece) said that the Commission had made some progress on the topic "Diplomatic protection". In relation to article 9, however, her delegation felt that the approach taken by the Special Rapporteur was not the best one. Instead, the traditional rule, which had been upheld by State practice and conventional texts, should be maintained; the legitimate concerns which existed could be taken into account by providing for exceptions to the rule, in the context of progressive development. Such exceptions would come into operation in cases of involuntary change of nationality, in particular State succession, where nationality was attributed directly and ipso jure by the law, and other cases including marriage and adoption.

8. The traditional rule addressed the concern about preventing abuse on the part of individuals or States through "forum shopping" and expressed the idea that through diplomatic protection the State asserted its own rights. While that approach did not entirely conform with the interests of the individual in the context of human rights, those rights were protected in other ways and by different means, including the right of individual petition under a human rights convention, which was detached from nationality altogether. Moreover, the merging of the concepts of diplomatic protection and human rights and the loss of clarity of their delimitative dimensions was not in the interest of international law or, ultimately, of individuals.

9. Those observations referred to article 9, paragraph 1, and were also applicable to paragraph 2, on the transfer of claims, a concept which her delegation viewed with great caution. Her delegation's

approach to both paragraphs would deprive paragraph 3 of much of its relevance; however, that paragraph needed to be retained in cases where there had been an involuntary change of nationality. Paragraph 4 provided a useful reminder of the obligation to abstain from the adoption of domestic legislation which would infringe on the need for diplomatic protection.

10. Article 10 reflected a well-established rule of international law. However, paragraph 1 should be amended to include the criterion of effectiveness, which was of crucial importance and had been consistently applied under human rights conventions, including the European Convention on Human Rights. Paragraph 2 was generally satisfactory; the expression "judicial or administrative courts or authorities whether ordinary or special" was sufficiently clear to meet the needs which arose.

11. In article 11, the two tests proposed in order to determine whether local remedies had been exhausted, which should apply alternatively and not cumulatively, were adequate to cover the requirements of the article; it would be up to the judge to apply those tests or criteria. There was no need for illustrative examples in that respect.

12. No substantive progress had been made on the topic "Unilateral acts of States". Her delegation felt that the Commission should focus on acts forming an autonomous source of international law, when a unilateral act constituted a binding obligation towards another State or States or towards the international community as a whole. Although such acts were not common, they must be regulated for reasons of legal certainty. Consequently, the Commission should not consider unilateral acts which were linked with a treaty or with a rule of customary international law, or institutional acts of international organizations.

13. With regard to the interpretation of unilateral acts, her delegation was not convinced that the establishment of an almost complete parallel with articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties was appropriate, because unilateral acts differed greatly from the written agreements to which that Convention referred. The starting point should be the interpretative needs of the unilateral acts themselves, followed by a finding of whether such needs would be well served by the appropriate rules of the Convention.

14. **Mr. Dinstein** (Israel), referring to the topic "Reservations to treaties", said that his delegation was concerned about the tendency to assimilate interpretative declarations to reservations; it believed that the two categories should remain separate. A reservation was a formal step whereby a State purported to exclude or modify the legal effect of a certain treaty provision in its application to that State, whereas an interpretative declaration merely clarified the meaning or scope attributed by a State to a treaty provision. A reservation was a *conditio sine qua non* to the consent of a State to be bound by a treaty, and, if accepted by other contracting parties, it became reciprocally binding; an interpretative declaration did not normally require any action on the part of other contracting parties. There were also distinctions between a formal reservation and an interpretative declaration in terms of when and in what form they could be formulated. Another cardinal difference was that if a reservation was accepted, and was compatible with the object and purpose of a treaty, it must be considered as an integral part of the treaty in the relations between the reserving State and the accepting parties; conversely, an interpretative declaration constituted merely a clarifying device relating to the interpretation or scope of a treaty. His delegation therefore felt that interpretative declarations should not be governed by the same rules as reservations to treaties.

15. On the question of the role of the depositary of a treaty in the communication of reservations, his delegation felt that the scope of the depositary's functions should not be broadened beyond the provisions of the Vienna Convention on the Law of Treaties, and that only States and international organizations that were contracting parties to a treaty should decide whether a given statement or instrument constituted a reservation and whether such a reservation was admissible.

16. With regard to the topic "Diplomatic protection", the first two reports submitted by the Special Rapporteur raised two central issues, namely, continuous nationality and exhaustion of local remedies.

17. There was no doubt as to the norms governing continuous nationality pursuant to customary international law. There was an established case law to the effect that, as a rule, diplomatic protection could only be exercised on behalf of a national of the plaintiff

State, and that the link of nationality must exist from the first to the last moment of the international claim.

18. The Special Rapporteur's original proposal in article 9 had been to depart from customary international law in cases where the injured person had undergone a bona fide change of nationality, so as to allow the new State of nationality to exercise diplomatic protection, provided that the State of original nationality had not already done so. That idea had been justly criticized by the majority of the members of Commission, for two reasons: first, it would allow "forum shopping", in other words, it would permit the injured person to try to acquire a new nationality with a view to increasing the chances of a claim being resolved; second, it would run counter to the basic concept underlying diplomatic protection, whereby the right to lodge an international claim against the injuring State was vested in the State of nationality and not in the injured person. Since the State of nationality was deemed by customary international law to be asserting its own right to submit a claim, the injured person had always been denied the right to waive a claim or to determine how it should be handled. If the injured person was incapable of a waiver, it was unclear why he should have the legal capacity to transfer the claim with him to a new State of nationality. Nor was it clear how that new State could maintain that it had been injured itself when it had no connection to the original injury at the time when that injury had occurred.

19. His delegation was nonetheless of the view that the Commission would be well advised to consider a less far-reaching alternative mentioned by the Special Rapporteur, namely, to retain the customary rule, subject to exceptions in the case of involuntary change of nationality. Unlike a voluntary change of nationality, which raised fears of abuse, involuntary change took place through nobody's fault, and common sense as well as justice demanded that the general rule of continuous nationality should be mitigated. There were two major scenarios involved: the disappearance of the State of original nationality and the death of the individual in question. In the first instance, where the State of original nationality no longer existed, it should be legitimate for a successor State to assume the right to continue with a claim in the exercise of diplomatic protection of the individual. In the second instance, where the individual had died and his heirs were foreign nationals, the customary rule was simply illogical. Since the right of the State of original nationality crystallized at the moment of injury, he failed to understand why it should be adversely affected by the subsequent death of the injured person. Involuntary change of nationality should not diminish the right vested in the plaintiff State.

20. As for the rule of exhaustion of local remedies, it was predicated on unimpeachable customary international law. The only possible critique of article 10 was that the rule, which had evolved over a long period in case law, had numerous specific applications not expressly addressed in the text. It might be advantageous to be more explicit about such practical problems as appeals and other available means of challenging a judgement under the domestic legal system, the potentially fatal consequences of not calling certain indispensable witnesses, and the need to avail oneself of all procedural means crucial to the success of the case.

21. Article 11 related to an important issue which had first surfaced in the Israeli pleadings before the International Court of Justice in the *Aerial Incident of 27 July 1955 case*. His Government's position had always been that when faced with an injury that was both direct and indirect, it was necessary to examine the component elements and to treat the incident as a whole on the basis of the preponderant element. Should the injury to a national giving rise to diplomatic protection be the preponderant element in the claim, the exhaustion of local remedies was indispensable. Conversely, if the direct injury to a State was the preponderant element in the claim, the exhaustion of local remedies ceased to be a required condition.

22. With regard to chapter VIII of the report, it was useful to distinguish between the forms of unilateral acts of States and their effects. As far as form was concerned, it was convenient to distinguish among four modalities: (1) specific notations to specific addressees; (2) general declarations or statements issued *urbi et orbi*; (3) action unaccompanied by any statement or declaration, such as the opening of hostilities; and (4) silence amounting to acquiescence. Since the Special Rapporteur had dwelt at length on the meaning of silence, it might be added that silence had legal consequences only in situations where the State knew of a certain event or a claim by another State and nonetheless declined to say or do anything by way of a timely response. In certain circumstances, the State's decision not to take action was itself an action.

23. With regard to the effects of unilateral acts, there were many possibilities. It might suffice to list 10 variables: (1) assumption of an international legal obligation, e.g., by accepting the compulsory jurisdiction of the International Court of Justice; (2) termination of an international legal obligation, e.g., by denouncing a treaty; (3) claim of a right, e.g., by asserting a certain maritime line delineating the continental shelf; (4) waiver of a right, e.g., by allowing a foreign State to prosecute an accredited diplomatic agent; (5) exercise of a right, e.g., by declaring a foreign diplomat persona non grata; (6) creation of a new status, such as a declaration of war or neutrality; (7) termination of such status; (8) recognition of a new State or Government; (9) interpretation of the State's own position vis-à-vis its obligations and rights; and (10) protest against another State's acts.

24. Obviously, as the Commission noted, all those effects were contingent on the validity of the unilateral acts of States. Acts which were invalid pursuant to international law were null and void, producing no effects whatsoever. Another point worth mentioning was that frequently a unilateral declaration by a State was not binding per se. Still, the declaration gave rise to a state of estoppel, so that the State was subsequently precluded from acting in a manner incompatible with the declaration. The subject of estoppel deserved to be addressed before the Commission finalized its study of unilateral acts of States.

25. In his fourth report, the Special Rapporteur had highlighted the pivotal question of the interpretation of unilateral acts of States. That was the crux of the issue, especially when it was argued that a State had, through a unilateral declaration, assumed a binding obligation. The interpretation of unilateral declarations of States must be undertaken carefully and the conclusion that a State had unilaterally assumed a binding obligation was wholly contingent on an unequivocal finding that such was the intention of the State issuing the declarations. Often, it was better to read the unilateral declaration together with some complementary declarations by other States suggesting that an international agreement had been reached.

26. It was important to bear in mind that a binding unilateral declaration was even more far-reaching than a treaty. As a rule, a State could denounce a treaty, yet there was no effective way to denounce a binding unilateral declaration. For all those reasons, his delegation strongly supported the proposal by the Special Rapporteur to apply to unilateral declarations the principles of interpretation contained in articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties.

27. **Mr. Pellet** (Special Rapporteur on reservations to treaties) expressed appreciation to the members of the Committee for having continued the practice instituted in 1997, during his chairmanship of the Commission, of inviting the special rapporteurs present in New York during the General Assembly to address the Committee in order to indicate what conclusions they drew from the debate. While that step had constituted real progress, he nonetheless felt that the results achieved were less than convincing. Whenever he participated in the Committee's debate, he found it extremely formal, to the point of being formalistic, and he wondered whether it might be possible to envisage a freer exchange of views between representatives of Governments and members of the Commission, provided that the latter clung to their role as independent experts.

28. A genuine debate would, of course, serve no purpose unless it was prospective in nature. States, almost by necessity, reacted to drafts that had already been adopted and to which the Commission would revert only on second reading, usually several years later. The only way to remedy that situation would be to undertake a thorough reform of the working methods of both the Committee and the Commission, a matter well worth considering. It would be much more useful for the Commission to have an indication of the general feeling among the members of the Committee before adopting a draft rather than afterwards.

29. Despite those criticisms, he had listened with great interest to the comments of States on the topic "Reservations to treaties". While no immediate conclusions could be drawn, the comments indicated tendencies which might have an influence on the Commission's future work on reservations. Useful suggestions had been made, although on occasion the criticisms that had been expressed concerning the draft guidelines had seemed to be based on a mistaken interpretation. Since he did not wish to monopolize the debate, he would confine himself to responding to the comments by States on the three questions raised by the Commission in paragraphs 20 to 24 of its report.

30. Governments appeared to be nearly unanimous in their view that the role of the depositary in respect of reservations should be in line with their role, pursuant to articles 77 and 78 of the Vienna Convention on the Law of Treaties. While he could not foresee what the Commission would decide in that regard, he intended, if he again found himself in the role of special rapporteur in the following year, to pursue that line of thinking in discussions on the subject.

31. With regard to conditional interpretative declarations, a clear tendency also seemed to have emerged from the discussions in the Committee. With notable exceptions, Governments seemed convinced that it was unnecessary to devote a long series of draft guidelines to the issue. That position seemed reasonable on one condition, namely, if the rules applicable to conditional interpretative declarations proved to be the same as those relating to reservations. So far that appeared to be the case, but as the effects of conditional interpretative declarations were as yet unknown, he would prefer a wait-and-see approach. It was necessary to determine that there was indeed no difference between the legal regime relating to reservations and the one relating to conditional interpretative declarations.

32. The most controversial issue remained to be addressed, namely, the late formulation of reservations. Like the members of the Commission, the representatives of Member States appeared to be fairly divided on the issue. With the exception of one delegation, which had been categorical in stating its views, no Government had questioned the fact that certain reservations were formulated late, however regrettable that might appear to some. Delegations were divided, however, as to whether it was advisable to include in the Guide to Practice one or more draft guidelines along those lines, which, according to some delegations, posed the risk of encouraging the late formulation of reservations.

33. While he was among the first to agree that such a practice must not be encouraged, he was somewhat baffled by the ostrich-like position of some delegations in refusing to admit that the practice of late formulation of reservations existed. All States, without exception, had participated in that practice, and none had ever protested against it in principle. Moreover, it was undeniable that the practice led to the formulation of reservations that all States agreed to consider as legitimate. Under those conditions, he failed to understand how delegations could question the advisability of mentioning the practice in the Guide to Practice, precisely in order to regulate it and limit its harmful effects.

34. As he had stated earlier, he was unable to draw conclusions from the debate in the Committee, because the Commission could not reopen debate in 2002 on what it had adopted in 2001. The debate highlighted the imperfections of the current mechanism of collaboration between the Committee and the Commission, a collaboration which all too often turned into a dialogue of the deaf. He deeply regretted that situation.

35. **The Chairman** expressed gratitude to the Special Rapporteur for his valuable work on the topic "Reservations to treaties".

The meeting rose at 4.15 p.m.